United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-7575

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United States Court of Appeals

FOR THE SECOND CIRCUIT

GETTY OIL COMPANY (EASTERN OPERATIONS), INC.,

Plaintiff-Appellant-Cross-Appellee,

—against—

SS PONCE DE LEON, her engines, tackle, etc., SUN LEASING CO., and TRANSAMERICAN TRAILER TRANSPORT, INC.,

Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT AND CROSS-APPELLEE GETTY OIL COMPANY (EASTERN OPERATIONS), INC.

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PRELIMINARY STATEMENT

Following the technique it used at trial, Sun/TTT misstates the issues and relies on vague generalizations and clearly mistaken factual and legal arguments in an attempt to support its position on appeal.

SUN/TTT BOLDLY MISSTATES THE ISSUES

Sun/TTT's bold misstatement of the issues sets the tone for its entire Brief. In its distorted version of the issues, Brief, 2, (following Sun/TTT's numbering):

1. Sun/TTT states a nonexistent "issue" (repeated in another form on pp. 10-11) because Getty has never contended that an anchored vessel has no obligations as a matter of law; it does contend that, in the circumstances here present (particularly the PONCE DE LEON's radio advice that she saw the WILMINGTON GETTY by radar and would pass clear), the WILMINGTON GETTY's actions met the applicable standard of reasonable care when considered on the proper basis of foresight.

2. Sun/TTT invents a new supposed "determination" by the District Court, which never held or even suggested that the WILMINGTON GETTY had the "last clear chance to avoid the collision."

3. Sun/TTT misstates by implication the law in this Circuit, under which conclusions of negligence or contributory negligence are conclusions of law and not subject to the clearly erroneous test.

SUN/TTT'S OMISSIONS AND MISLEADING STATEMENT OF THE FACTS

1. Sun/TTT's most inexcusable omission is that its Brief nowhere mentions the pivotal fact that three minutes before collision, knowing the WILMINGTON GETTY was motionless at anchor about 0.5-0.6 mile (over 3000 feet) away, the PONCE DE LEON advised by radio that she would pass between the WILMINGTON GETTY and Norton Point (JA 108-9, Findings 28, 29) - thereby providing an assurance that she would carry out her duty to keep clear of

the anchored vessel. It is undisputed that the PONCE DE LEON had ample maneuverability to do as she had promised and that she never notified the WILMINGTON GETTY that she even was having any difficulty, let alone request that the WILMINGTON GETTY herself take action. It is equally undisputed that only the PONCE DE LEON had knowledge of her own engine orders, rudder orders, maneuvering capabilities and draft; the WILMINGTON GETTY knew none of these things. As will be seen, the PONCE DE LEON had ample room (400 yards of deep water) to pass clear east of the WILMINGTON GETTY. In light of that situation, the limited knowledge available to the WILMINGTON GETTY, and the PONCE DE LEON's gross negligence, we submit that, applying the proper test of reasonable care on the basis of foresight, Sun/TTT failed to prove the WILMINGTON GETTY was contributorily negligent, and the District Court erred in concluding that she was.

To buttress its arguments further Sun/TTT paints a picture of events which is contrary to both the evidence and the District Court's findings and seems to be designed to convey the impression that the PONCE DE LEON was largely a victim of circumstances. In fact, the PONCE DE LEON's navigation was grossly and repeatedly negligent, and the collision was solely due to her negligence.

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2. Sun/TTT unfairly seeks to excuse the PONCE DE LEON's recklessly excessive speed by (a) wrongly stating she was in a "convoy" (Brief, 14) and (b) implying that the WILMINGTON GETTY was making the same sort of speed as the PONCE DE LEON by saying the WILMINGTON GETTY traversed Ambrose Channel at an average speed of 11 to 12 knots (Brief, 4).

As to (a) in fact there was no "convoy", nor any evidence of one. The PONCE DE LEON was behin the SEALAND BOSTON but, far from being required to maintain a certain distance behind her, had the right and obligation to proceed at a moderate speed; moreover, by radio, she could alert any vessel behind her as to speed reductions and intentions. As to (b) in fact, in the relevant area, i.e., between Buoy 14 and the anchorage area, the uncontradicted evidence establishes that the WILMINGTON GETTY averaged only 4.8 knots between Buoys 14 and 18 and averaged only 3.2 knots between Buoy 18 and her anchorage position. (See Getty's Main Brief, 8-9.) This is in sharp contrast to the grossly excessive speed of the PONCE DE LEON, of 10.5 to 12 knots until collision (JA 107, Finding 21; JA 109, Finding 30), for which the PONCE DE LEON was properly condemned by the District Court. That the PONCE DE LEON's high speed was incredibly reckless is demonstrated by the fact that, never stopping or reversing her engine, she averaged 12 knots (1200 feet per minute) in the last five minutes before collision in visibility the PONCE DE LEON's men estimated at no more than 100 feet

(JA 111, Finding 35).

3. Sun/TTT avoids stating where the collision occurred, thereby enabling it to advance a generalized argument, unrelated to this significant undisputed fact. In fact, based on the evidence of the PONCE DE LEON's master (JA 331, 343, 330) and her chart (Ex. 21), the collision position is that shown on Annex I to Getty's Main Brief - 375 yards outside Ambrose Channel. [See Getty's Main Brief, 15-16.] Sun/TTT attempts to obscure where the collision occurred by alleging vaguely (Brief, 7) that the WILMINGTON GETTY's position was "different" from where she originally anchored and suggesting (Brief, 16) that the WILMINGTON GETTY was "200-375 yards" outside the line of buoys. The District Court was perhaps confused* by this, but we trust this Court will not be misled.

4. Sun/TTT mistakenly alleges that the PONCE DE LEON was "just approaching Buoy 18" when her master first saw the WILMINGTON GETTY's radar echo, which was then so close to the SEALAND BOSTON's echo as to merge and give the appearance of one target on the radarscope (Sun/TTT Brief, 7-8). We suggest that Sun/TTT's vague assertion is made to excuse the PONCE DE LEON's negligent failure to learn from radar that the WILMINGTON GETTY was stationary - hence

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* The District Court never made a definite finding as to the WILMINGTON GETTY's anchored position or collision position which, of course, were the same.

anchored. In fact, the PONCE DE LEON was one mile south of Buoy 18 at first radar sight and the radar echoes were not merged.

The PONCE DE LEON's master first sighted the WILMINGTON GETTY's echo on the edge of her radarscope at a distance of two miles (JA 106, Finding 19).* Since the WILMINGTON GETTY was anchored approximately one mile north of Buoy 18, (JA 109, Finding 30), a simple measurement, apparently overlooked by the District Court, establishes that the PONCE DE LEON, at first radar sight, must have been about one mile south of Buoy 18. Indeed Sun/TTT concedes first radar sight was about 1300 hours (Brief, 7). [See Getty's Main Brief, 24-25 and Annex I, for a more accurate estimate of the time of first radar sighting as about 1303-1304 hours, which is about when the PONCE DE LEON reached a point two miles from the collision position.]

Another simple measurement (also apparently overlooked by the District Court), establishes that since the SEALAND BOSTON was one mile ahead of the PONCE DE LEON (JA 105, Finding 13), the SEALAND BOSTON must have been approximately abreast of Buoy 18 and one mile south of the WILMINGTON GETTY when the PONCE DE LEON's master first sighted the WILMINGTON GETTY by radar.

Sun/TTT refers this Court only to the evidence of the PONCE DE LEON's master, Captain Meade, who initially stated that on

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* This finding is fundamental. The District Court's subsequent inconsistent Finding 20 must stem from its inexplicable failure to make the simple distance measurements we describe.

first radar sight the WILMINGTON GETTY was "practically synonymous" with the Sea-Land vessel - a clearly evasive answer (JA 271). Sun/TTT ignores the portion of Captain Meade's testimony (JA 328-329) where he finally admitted that: (a) he saw the SEALAND BOSTON's radar echo approaching the WILMINGTON GETTY, (b) he watched their radar echoes allegedly merge for a brief period of time, and (c) thereafter he saw the SEALAND BOSTON's echo break away from the WILMINGTON GETTY's (See JA 38-39).

Thus, clearly the PONCE DE LEON's master had the WILMINGTON GETTY in sight on radar between 1303 and 1314 hours - approximately 6 minutes before turning out of the channel and 11 minutes before collision. Certainly he had ample time and distance before turning out of the channel to evaluate the situation by proper plotting and determine that the WILMINGTON GETTY was stationary. [This should have been especially apparent anyway, since he saw the SEALAND BOSTON approach and pass the WILMINGTON GETTY.] In any event, it was gross negligence to turn toward the WILMINGTON GETTY, if he did not know what she was doing.

Sun/TTT's vague assertions as to where the PONCE DE LEON sighted the WILMINGTON GETTY and where the latter was anchored seem to be an attempt to make it appear that the WILMINGTON GETTY's position somehow contributed to the collision because she was allegedly so close to the channel that her radar echo merged with that of the passing SEALAND BOSTON, confusing the PONCE DE LEON.

However, even if the radar echoes merged briefly, since the PONCE DE LEON's master saw the WILMINGTON GETTY's unmerged echo long before such merging (and after), he had no excuse for his negligent failure to plot and thereby learn that the WILMINGTON GETTY was anchored.

5. Sun/TTT also wrongly states (Sun/TTT Brief, 7) that approximately when the PONCE DE LEON first observed the WILMINGTON GETTY by radar, the WILMINGTON GETTY "was moving through the water, completing her swing with the flood tide." (See also Sun/TTT Brief, 17-19.) This is an obvious attempt to create the illusion that the PONCE DE LEON's master's mistaken "determination" that the WILMINGTON GETTY appeared to be a vessel under way slowly moving up channel (Sun/TTT Brief, 8) was justified by his radar observations. In fact, on the findings of the District Court, the WILMINGTON GETTY had completed her swing by about 1300 hours (JA 105) - the precise time being 1255 (JA 146, Ex. 4). As previously noted, the District Court found that the PONCE DE LEON first observed the WILMINGTON GETTY by radar at two miles. Buoy 14, which the PONCE DE LEON passed at 1302 hours (JA 107, Finding 21), is slightly more than two miles from the collision position. (See Annex I to Getty's Main Brief.) Thus, the PONCE DE LEON could not possibly have seen the WILMINGTON GETTY by radar before approximately 1303 hours. Accordingly, clearly the WILMINGTON GETTY was completely stationary when the PONCE DE LEON first observed her by

radar. Proper use of radar (including a manual plot) would have disclosed to the PONCE DE LEON's master that she was stationary and, being so, very probably was at anchor,* given her position east of the line of buoys marking Ambrose Channel (JA 107, Finding 23).

It follows that the PONCE DE LEON should have known from radar alone that the WILMINGTON GETTY was probably at anchor before turning out of the channel at about 1309 hours. [Indeed, there is substantial evidence in the record from which the District Court should have concluded that the PONCE DE LEON's master in fact knew the WILMINGTON GETTY was anchored before he turned out of the channel. See Getty's Main Brief, 11-12.] The point is significant because, as the PONCE DE LEON's master admitted, if he had known the WILMINGTON GETTY was at anchor he would have continued on course, passed west of her, and then turned into Gravesend Bay to anchor (JA 317). It also follows that, since the PONCE DE LEON's master knew or should have known by radar that the WILMINGTON GETTY was stationary and probably at anchor, the WILMINGTON GETTY (which was entitled to presume that other vessels were navigating properly) had no obligation at the material time to be making security calls - as her status as a stationary anchored vessel should have been clear to anyone using

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* In view of the flooding tidal current the only alternatives would be those of a northbound vessel backing her engine to maintain a stationary position (most unlikely) or a southbound vessel going slightly ahead on her engine to stay still. In either case, however, the PONCE DE LEON should have kept well clear.

radar properly, as it apparently was to the many other vessels that safely passed her.

6. Sun/TTT unjustifiably endeavors to excuse the PONCE DE LEON's blind turn by wrongly asserting that the PONCE DE LEON (a) followed the path taken by all vessels seeking anchorage after exiting the channel at Buoy 18 and (b) claiming that the PONCE DE LEON's maneuvers were identical to those of the WILMINGTON GETTY.

In fact, as to (a), we have seen that the PONCE DE LEON's master himself has testified that if he had known the WILMINGTON GETTY was anchored [as he should have] he would have passed west of the WILMINGTON GETTY and then turned into the anchorage. As to (b), it is uncontradicted that, as the WILMINGTON GETTY approached the anchorage area, she heeded her radar which indicated that the anchorage areas were then crowded; proceeding slowly, she prudently avoided further crowding those vessels and anchored in a clear area just outside the anchorage area off Norton Point. Her anchoring there was held to be proper.* (JA 103, Findings 5 and 6; JA 121.) This was in sharp contrast to the grossly negligent action of the

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* It is worth noting that in fact the designated anchorage areas had been temporarily closed to shipping by a Coast Guard Local Notice to Mariners effective March 15, 1973 (JA 587-8), which the WILMINGTON GETTY had not received. Accordingly, her anchoring outside the designated areas was, by happenstance, in compliance with that notice. But, considering that notice, there was no legal justification for the PONCE DE LEON not appreciating the WILMINGTON GETTY was at anchor, from the mere circumstance she was 300 yards south of the designated (but "closed") anchorage area.

PONCE DE LEON in proceeding at high speed toward the same crowded anchorage area and, moreover, proceeding towards and finally too dangerously close to the anchored WILMINGTON GETTY. The PONCE DE LEON's turn was "blind" in that she made it without determining that the WILMINGTON GETTY in fact was stationary and anchored. See Afran Transport Co. v. The Bergechief, 274 F.2d 469, 472 (2 Cir. 1960). Indeed, it was perhaps worse than "blind" because it was the only maneuver which could permit risk of collision to arise. Thereafter the PONCE DE LEON compounded her error by woeful failure to use her radar or maneuver adequately after having assured the WILMINGTON GETTY she would pass between her and Norton Point.

FIRST POINT

SUN/TTT DOES NOT CONTEST THE FOLLOWING ASSIGNMENTS OF ERROR AND THUS IMPLICITLY CONCEDES THE DISTRICT COURT ERRED IN NOT CONCLUDING:

A. THAT THE PONCE DE LEON SHOULD HAVE BEEN HELD AT FAULT FOR BLINDLY TURNING OUT OF THE CHANNEL TOWARDS THE WILMINGTON GETTY CREATING A HAZARDOUS CLOSE QUARTERS CONDITION WHERE NONE HAD EXISTED BEFORE (GETTY'S MAIN BRIEF, 27-31); AND

B. THAT, AFTER THE PONCE DE LEON ASSURED THE WILMINGTON GETTY SHE WOULD KEEP CLEAR, THERE WAS TIME AND SPACE FOR THE PONCE DE LEON ALONE TO AVOID COLLISION IF SHE MADE PROPER USE OF HER RADAR AND MANEUVERED PROPERLY TO KEEP CLEAR, BUT SHE NEGLIGENTLY FAILED TO DO SO AND WAS AT FAULT IN THAT RESPECT (GETTY'S MAIN BRIEF, 12-13, 18-20, 31-32).

We submit that Sun/TTT's Brief does not contest either of the foregoing errors by the District Court because it cannot rebut the

uncontradicted evidence and the applicable law which conclusively establish those additional faults.

On those points alone, the District Court's decision should be reversed and the PONCE DE LEON condemned in sole fault.

SECOND POINT

ANSWERING SUN/TTT'S POINT II, B, BRIEF, 16-18: THE WILMINGTON GETTY WAS NOT ANCHORED IN A "HAZARDOUS" OR "DANGEROUS" LOCATION WITH RESPECT TO ANY VESSEL EXERCISING REASONABLE CARE IN COMPLIANCE WITH THE LAW.

The District Court found (JA 103, Finding 6) that the WILMINGTON GETTY was anchored at the head of "the customary navigable throughway used by vessels approaching the only safe anchorage after exiting Ambrose Channel at Buoy 18." The District Court's citations to the record do not support that finding, which Sun/TTT (Brief, 16-17) has chosen to emphasize.

At the outset it is absurd to assert, as does Sun/TTT (not the District Court), that the WILMINGTON GETTY "obstructed" a "throughway" to an anchorage which had been officially closed by the Coast Guard for nearly two months before collision (JA 588). The "obstruction" idea was mentioned by Sun/TTT's alleged expert, Dervin, who testified that the WILMINGTON GETTY was anchored:

> "... obstructing the entrance to that Gravesend Bay anchorage by any other vessel. And in an area of that anchorage, the ships that came in there pass Buoy 18, they have to go to the right in order to get into the anchorage. And if he [the WILMINGTON GETTY] is there in the way, I mean, what can you do?"
>
> (JA 456, emphasis added.)

Although Dervin no doubt thought his question rhetorical, the courts have uniformly answered it in plain terms - an anchored ship is a condition of navigation which the moving ship must respect and avoid. The Randa, 56 F. Supp. 508, 511 (S.D.N.Y. 1944); The Bright, 38 F. Supp. 574, 580-581 (D. Md. 1941). Cf. The Deutschland, 90 F.2d 454 (2 Cir. 1937). That principle applies here. Long before the PONCE DE LEON turned out of the channel she saw the anchored stationary WILMINGTON GETTY by radar two miles off, and it was the PONCE DE LEON's duty to give her a sufficiently wide berth to avoid risk of collision - a duty which she could easily have accomplished by the least display of due care.

Further, contrary to Dervin's unwarranted assertion, the PONCE DE LEON did not have to turn right at Buoy 18. The anchorage area is 1.5 miles long and .5 mile wide (per chart measurement), and could obviously be entered at any point the PONCE DE LEON chose. The PONCE DE LEON's own master demolishes Dervin's assertion* since his testimony clearly proves that the PONCE DE

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* That Dervin was more of an advocate than an independent expert is clear from his refusal to criticize the PONCE DE LEON's excessive speed, his suggestion that he might proceed up Ambrose Channel at 11 knots in dense fog, his claim that the moderate speed in fog rule (Article 16, 33 U.S.C. § 192) is not always in effect for large, fast ships (JA 484-487). In Rederiet For M/T Seven Skies v. S.S. North Dakota, 242 F. Supp. 385, 389 (S.D.N.Y. 1962) aff'd per cur. 347 F.2d 507 (2 Cir. 1965) the District Court correctly rejected the unsound views of such an alleged expert. That should have been done in this case.

LEON could easily have passed west of the WILMINGTON GETTY and then turned into the anchorage; the only reason she did not do so was the master's groundless and erroneous assumption, which he called a "mental assessment", made without a radar plot, that the WILMINGTON GETTY was under way heading north. (JA 317-318.)

By simple measurement on the nautical charts (Exhibits 2, 3 21 and Annex I to Getty's Main Brief) west of the WILMINGTON GETTY there was a space of approximately 0.35 mile or 700 yards to the middle of Ambrose Channel (extended) and east of the WILMINGTON GETTY there was more than approximately 0.2 mile or 400 yards of deep water [a distance over half the width of Ambrose Channel] available for the PONCE DE LEON's use.*

That the PONCE DE LEON could have passed safely east of the WILMINGTON GETTY by reasonably prudent maneuvers is confirmed by the testimony of Sun/TTT's alleged expert, Dervin, who testified that he would be sure to keep well clear of a radar echo such as the WILMINGTON GETTY (whether stationary or going north or south) by watching his radar carefully and keeping the contact well to his left; indeed, he testified that, even at a half-mile distance, there was enough room to turn and make sure to avoid the WILMINGTON GETTY (JA 513-515). Thus, even in his

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* There was additional space to the west of the middle of Ambrose Channel, if needed.

opinion, the PONCE DE LEON could and should have made sure of passing clear of the WILMINGTON GETTY.

We respectfully submit the above shows conclusively that the anchored location of the WILMINGTON GETTY was not "hazardous" or "dangerous", as characterized by the District Court, provided that moving vessels were navigated with reasonable care. If one reflects, what was dangerous about her location, for the PONCE DE LEON which, equipped with radar, detected her two miles off the starboard bow - out of her path and lying still? Nothing! In simple truth the PONCE DE LEON, proceeding recklessly fast, without radar plotting and on the asserted but completely unjustified assumption that the WILMINGTON GETTY was going north, turned towards her, unnecessarily creating a risk of collision. Then, after receiving a radio warning in ample time to keep clear and giving an assurance that she would, the PONCE DE LEON so botched her navigation as to strike her. Even so the PONCE DE LEON almost got by and only contacted the WILMINGTON GETTY's anchor chain and stem with her port side aft as she was nearly drawing clear after visual sight.

THIRD POINT

ANSWERING SUN/TTT'S POINT II. C. (1): ADDITIONAL SECURITY CALLS WERE NOT REASONABLY NECESSARY FOR ANY OF THE MANY SHIPS THAT SAFELY PASSED THE WILMINGTON GETTY, NOR WERE THEY NECESSARY FOR THE PONCE DE LEON. IN ANY EVENT THEIR ABSENCE DID NOT CONTRIBUTE TO COLLISION.

The WILMINGTON GETTY issued a security call when she anchored to indicate to nearby vessels her change of status from under way to anchored (JA 242). She made no additional calls because her experienced master did not consider the location dangerous and did not wish to crowd the already heavily used radio channel (JA 232-233, 245). In addition to anchoring well outside the channel, the WILMINGTON GETTY continually monitored her radar and radio, and these precautions effectively enabled her to give a timely warning to the PONCE DE LEON. Any other ships deviating from the channel would have received a similar timely warning.

Numerous vessels safely passed the WILMINGTON GETTY without the need for additional general security calls, a point mistakenly overlooked by the District Court. If any of those vessels were seeking anchorage*, they did so by making proper use of their radars to pass the WILMINGTON GETTY safely and presumably went into the anchorage area north of the WILMINGTON GETTY.

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* There is no evidence whatsoever that the PONCE DE LEON "was the first vessel which was forced to seek safe anchorage after the WILMINGTON GETTY anchored," as Sun/TTT mistakenly asserts at Brief, 18, 20.

The absence of additional security calls was not negligent and did not contribute to collision because: (a) the WILMINGTON GETTY's location was not dangerous; (b) by proper radar use the PONCE DE LEON could and should have learned the WILMINGTON GETTY was stationary and at anchor, and the WILMINGTON GETTY was entitled to presume that vessels would navigate with due care; (c) the PONCE DE LEON probably knew the WILMINGTON GETTY was anchored, before she turned out of the channel, supra, p. 9 ; and (d) in any event, she received a radio warning that the WILMINGTON GETTY was anchored in ample time for her to avoid collision if she used her radar and navigated with anything resembling reasonable care, so the absence of a security call was not a contributory cause of collision.

Without security calls, the PONCE DE LEON had all of the information reasonably necessary to avoid striking the WILMINGTON GETTY. In a candid moment Captain Meade of the PONCE DE LEON admitted that the absence of a security call did not contribute to the collision (JA 348). The District Court should have so concluded.

FOURTH POINT

ANSWERING SUN/TTT POINTS II. C (2) AND (3): IN THE CIRCUMSTANCES THE WILMINGTON GETTY WAS NOT NEGLIGENT IN NOT KEEPING HER ENGINES ON STANDBY AND NOT LETTING GO HER ANCHOR CHAIN.

The District Court did not find any custom to keep engines on standby, i.e., ready for instant movement, in a location such as the WILMINGTON GETTY's. Sun/TTT's assertion that Dervin testified to such a custom (Brief, 20-21) is unsupported by its citations and untrue. The cited testimony on standby by Dervin was merely to the effect that he would have kept engines on standby (JA 476-77, 533), an obvious exercise in hindsight. The WILMINGTON GETTY's master (who was actually on the scene) disagreed, testifying that the location was not dangerous and there was no need to be on standby (JA 232-3). The PONCE DE LEON's master did not testify directly about standby but by implication would agree with the WILMINGTON GETTY's master, as he testified that he did not expect the anchored WILMINGTON GETTY to move in a short time (JA 294). Thus, contrary to Sun/TTT's erroneous claim (Brief, 21), as in The Charles Hubbard, 229 F. 352, 356 (6 Cir. 1916), so here, "[t]here is no evidence whatsoever in the record that it was customary for a ship lying at anchor, as the [WILMINGTON GETTY] was," to remain on standby. As the Court found, the WILMINGTON GETTY's engines were in a state of readiness to maneuver in 3-5 minutes (JA 103, Finding 7),

which was all that was reasonably needed.

Sun/TTT repeatedly argues that the WILMINGTON GETTY "took no action to avoid collision" (Brief 9, 18, 27), totally ignoring the uncontradicted evidence establishing that the WILMINGTON GETTY timely informed the PONCE DE LEON that she was anchored and received the PONCE DE LEON's assurance that she would keep clear. Sun/TTT does not dispute the uncontradicted evidence that the PONCE DE LEON should then have been able alone to avcid collision if she had been properly navigated. Supra, pp. 11-12*

Getty has never disputed that in the five minutes between the PONCE DE LEON's initial turn and the collision, there was time for the WILMINGTON GETTY to move.** But time is not the issue. The sole issue is whether, in light of the PONCE DE LEON's radioed assurance that she would keep clear, the WILMINGTON GETTY's radar observations that she was passing clear, and the absence of any warning from the PONCE DE LEON that she was having difficulty, the anchored WILMINGTON GETTY had a duty as a matter of reasonable foresight to take further action in the three

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* Sun/TTT stresses that the PONCE DE LEON's two radars were being "constantly monitored", Brief 6, 7, 14. If that were true, collision could never have occurred. In fact, neither the master nor the watch officer were constantly monitoring the radar (Meade JA 270, 329; Benson JA 375). The failure to constantly monitor the radar proximately caused the collision. The Salaverry [1968] 1 Lloyd's Rep. 53, 62.

** But even here, Sun/TTT misrepresents, claiming that the WILMINGTON GETTY's watch officer admitted it would take at most two minutes to release the chain (Brief, 27) when in fact he testified it would take at least two minutes (JA 206.)

minutes between 1311 and collision. Getty submits she did not.

Sun/TTT cites no pertinent authority for its argument that the WILMINGTON GETTY, in the circumstances existing here, had a duty to move instantaneously by engine or to let go her anchor chain. None of the ancient cases cited by Sun/TTT (Brief, 11) involved the use of radio, and only one involved the use of radar (Rederiet for M/T Seven Skies, supra, p. 13).

In the one case in which the vessels communicated while in visual sight of each other before collision, The Richmond, 63 F. 1020 (2 Cir. 1894), the moving vessel timely asked the anchored vessel to move to try to assist in avoiding collision, but the anchored ship negligently failed to do so and was held in contributory fault. Here, the PONCE DE LEON not only never asked the WILMINGTON GETTY to move but her master knew the WILMINGTON GETTY could not move in a short time, he never expected her to move, and he assured her that the PONCE DE LEON saw her and would keep clear (JA 284-5, 294, 349). Fairly considered, the WILMINGTON GETTY had no duty to take any action to move before visual sight.

Sun/TTT cites no case, nor have we found any, in which the courts have held an anchored vessel contributorily liable for not taking action with engines or by slackening her anchor chain before visually sighting a moving vessel. The reason seems obvious. Radar observation alone cannot give reliable information as to a vessel's present heading [only her past average course]

and, without that, any move would be based on speculation. Accordingly, the authorities cited by Sun/TTT are not in point. The District Court's decision is contrary to Rederiet For M/T Seven Skies, supra, 13, in which the anchored SEVEN SKIES saw an approaching ship by radar long before collision; she received no radio assurance, but was exonerated even though she took no action to move until visual sight at one-half mile, which proved to be too late.

There is little point in requiring radio communication (33 C.F.R. § 26.01 et seq.) unless, as a corollary to the duty to use radio, one ship has a right to rely reasonably on the other to carry out her stated intentions. Sun/TTT's argument that the WILMINGTON GETTY had a duty to be ready to move instantly or let go her chain after receiving the PONCE DE LEON's radio assurance can only be predicated on the erroneous proposition that she had a duty to anticipate that the PONCE DE LEON would not do as she had said she would, i.e., to anticipate the PONCE DE LEON's negligence. In the seconds between visual sight and collision there was time neither to let go the anchor chain nor use engines. The WILMINGTON GETTY's inability to move as swiftly as Sun/TTT now demands was not negligence and did not contribute to collision.

FIFTH POINT

ANSWERING SUN/TTT's POINT II C (4): THE LACK OF A MANUAL PLOT BY THE WILMINGTON GETTY DID NOT CONTRIBUTE TO COLLISION BECAUSE ON UNCONTRADICTED EVIDENCE, A DETERMINATION OF THE PONCE DE LEON'S CLOSEST POINT OF APPROACH COULD NOT BE MADE SINCE HER COURSE AND SPEED WERE CHANGING AND, IN ANY EVENT, THERE WAS NO TIME FOR A MANUAL PLOT BETWEEN 1311 WHEN THE PONCE DE LEON GAVE HER RADIO ASSURANCE AND VISUAL SIGHTING SECONDS BEFORE COLLISION AT 1314 HOURS.

The District Court made no specific finding as to whether or how the lack of a manual plot by the WILMINGTON GETTY contributed to collision - contenting itself with the general observation that the WILMINGTON GETTY was at fault for not making a manual plot (JA 124-125). In doing so it overlooked the uncontradicted evidence of Fonda, the only radar expert to testify, that if a ship is changing course and speed [as was the PONCE DE LEON] it is impossible to forecast her closest point of approach [CPA] (JA 541-2, 553).

In an effort to bolster the District Court's opinion Sun/TTT's Brief, 32-33, resorts to misrepresenting the evidence. Thus, a check of Sun/TTT's citations to the record discloses that: (a) Dervin did not testify that the WILMINGTON GETTY's watch officer "had more than sufficient time to realize the situation" (Brief, 32-33). (b) Fonda did not testify that the watch officer could have determined that the PONCE DE LEON was "going to hit him or come awfully, awfully close" (Brief, 33). Instead, as the record

shows, Fonda testified as follows in answer to a hypothetical question asking him to assume different facts from radar indications that the PONCE DE LEON was going to pass clear ahead (as the WILMINGTON GETTY's watch officer testified), namely to

> "... assume that he observed a radar contact coming toward him, could he tell accurately enough from the radar whether that vessel might pass ahead of him, astern of him or hit him?
> A. He can tell whether it is going to hit him or come awfully, awfully close.
> Q. Could he tell with sufficient accuracy and know whether he should let go of his chain or go forward, if he had the capability?
> A. I don't think so."
>
> (JA 553, emphasis added.)

Fonda's testimony above indicates that even if the radar contact was heading directly towards the WILMINGTON GETTY, her watch officer could not determine sufficiently accurately from radar whether to move forward or back. Sun/TTT endeavors to twist that into the false statement that in the actual situation presented the watch officer could have determined that the PONCE DE LEON would hit or come awfuly close.

Since it is undisputed that the PONCE DE LEON was changing course and speed at the material time, Fonda's uncontradicted expert evidence on the actual situation confronting the WILMINGTON GETTY conclusively shows that she could not determine the CPA of the PONCE DE LEON. That evidence was:

"A ... Normally the closest point of approach is the item which is of most importance to you so many times you don't get into determining the course and speed of another ship but you want to know how close it is going to come and it is a simple thing to keep track of this as long as the ships involved maintain their courses and speed. As soon as either ship changes its course and speed, the whole situation becomes so complex.
THE COURT: It becomes very uncertain?
THE WITNESS: YES.
A. You really can't forecast it ..."

(JA 540-41, emphasis added.)

* * *

"Q. The accuracy of that determination [that the WILMINGTON GETTY could determine whether a vessel turning out of the channel would pass ahead] would depend on what?
A. The constancy of the speed of the oncoming target and the constancy of course. If it is changing course and speed, the radar indications can be very confusing and misleading."

(JA 553, emphasis added.)

Here, by radar, the WILMINGTON GETTY's watch officer estimated that the PONCE DE LEON would clear the WILMINGTON GETTY by passing ahead (JA 156, 407). However, since the PONCE DE LEON was changing both course and speed, he was unable to calculate her CPA and thereby determine that she would come close enough to contact the WILMINGTON GETTY's anchor chain, dragging her into collision. Under those conditions, we submit he was entitled to rely on the PONCE DE LEON's assurance and, having no reason to think she would not clear ahead, had no

duty to go astern on the engines or let go the anchor chain on mere speculation that she would not carry out her duty.

The PONCE DE LEON's speed and course changes were of course completely unknown to the WILMINGTON GETTY but, now that we have the clarity of hindsight, it is easy to see what occurred. Initially the PONCE DE LEON was swinging right with her engine half ahead. At or after the radio conversation with the WILMINGTON GETTY she reduced engine speed at 1311 hours to dead slow ahead (Ex. 20) which would have the ultimate effect of reducing her rate of swing (see JA 332) as the vessel gradually reduced headway, eventually bringing her closer to the WILMINGTON GETTY than would have been the case if no speed reduction were made. This was the very type of speed change which (especially when coupled with a changing course) makes a forecast of CPA impossible as Fonda testified, supra, pp. 23-4. Moreover, in these last minutes of her turn, her rudder was only 15°-20° right (JA 333-4), only half the maximum of 35° which was available under hard right rudder (Ex. 24, p. 19).* The WILMINGTON GETTY had no way of knowing that the PONCE DE LEON was failing to compensate for her reducing speed by increasing rudder angle.

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* If the PONCE DE LEON had made use of her full rudder capability at the time of the radio communications, she could have easily carried out her radio assurance and passed well clear. There was ample room - over 400 yards of deep water to the east.

The PONCE DE LEON's further mistakes occurred after she sighted the WILMINGTON GETTY visually only seconds before collision. Upon sight she belatedly put her rudder hard right (JA 333, 373) and increased engine speed to slow ahead, timed to the nearest minute at 1313 to accelerate her bow's swing to the right, which of course would accelerate her stern's swing to the left (JA 340, Ex. 20). Then her second officer on the bow saw that her stern was swinging too close to the WILMINGTON GETTY and informed the bridge (JA 383-4) which, too late, ordered hard left rudder to swing her after section clear; although the PONCE DE LEON's bow was swinging left by collision (JA 339-40) at 1314 hours PONCE DE LEON time, her port side aft contacted the WILMINGTON GETTY's anchor chain and collision occurred.

With all these things occurring in three minutes the impossibility (reasonably considered) of accomplishing anything useful by a manual plot becomes obvious.

Sun/TTT further evades the issue by arguing that there was time to plot, (although misrepresenting the time available, there being only five minutes not six between the PONCE DE LEON's turn at Buoy 18 and collision*). The point is that,

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* Collision occurred at 1313 WILMINGTON GETTY time and 1314 PONCE DE LEON time. Thus one minute must be added to WILMINGTON GETTY time to conform to PONCE DE LEON time. Sun/TTT has no basis for arbitrarily stretching the time from 1308 WILMINGTON GETTY time to 1314 PONCE DE LEON time.

even with a five-minute time period available, the changing course and speed of the PONCE DE LEON made plotting useless and - midway through the five-minute period - the PONCE DE LEON expressly informed the WILMINGTON GETTY that she would pass between her and Norton Point, thereby making the PONCE DE LEON's prior movements irrelevant whether plotted or not.

In Rederiet For M/T Seven Skies, supra, p. 13, the anchored SEVEN SKIES sighted the approaching NORTH DAKOTA about 27 minutes before collision, and her officers concluded she would pass about one-half mile astern of the SEVEN SKIES, p. 387. No mention is made of radar plotting. If those on the SEVEN SKIES plotted, they apparently erred in their calculation of the NORTH DAKOTA's CPA. But whether she plotted or not, the SEVEN SKIES was not criticized for failing to move before visual sight, nor was she criticized for an absent or inaccurate radar plot.

Sun/TTT was unable to answer Getty's Main Brief (33-35, 44-46), and its distortions of the record should not be countenanced by this Court.

Since a manual plot would have ascertained nothing useful, its absence did not contribute to the collision. Going one step further, since the WILMINGTON GETTY could not reliably determine the PONCE DE LEON's CPA, she had no reason to doubt her radio assurance of passing between the WILMINGTON GETTY and Norton

Point and therefore had no duty to move in the circumstances.

The PONCE DE LEON's arguments that the WILMINGTON GETTY should have known to move sooner are based only on the usual hindsight which a grossly negligent ship typically invokes. As this Court stated in a different context, Hellenic Lines, Ltd. v. The Exmouth, 253 F.2d 473, 476 (2 Cir. 1958), reversing the District Court and holding a burdened vessel in a crossing situation in sole fault:

> "Under ordinary circumstances Hellenic, as the privileged vessel, was entitled to maintain her course and speed. If Hellenic had to speculate that Exmouth would not obey the rules and engage in avoiding action on that assumption, the rules might as well be discarded. Navigation would be reduced to a game of bluff (Wilson v. Pacific Mail S.S. Co., 276 U.S. 454, *** The Delaware, 161 U.S. 459 ***; National Bulk Carriers v. United States, 2 Cir., 1950, 183 F.2d 405; Pacific-Atlantic S.S. Co. v. United States, 4 Cir., 1949, 175 F.2d 632 ***."
>
> (Emphasis added.)

A fortiori, the anchored WILMINGTON GETTY was entitled to hold her position at rest, especially after the radio assurance from the PONCE DE LEON, on which she had a right to rely. She had no duty to speculate that the PONCE DE LEON would not do exactly as she promised, and she had no means to tell accurately or quickly enough (because of the PONCE DE LEON's high speed turning and speed changes) that the PONCE DE LEON would cut a few feet closer to the WILMINGTON GETTY than was safe.

SIXTH POINT

ANSWERING SUN/TTT'S POINT I, B: THE DISTRICT COURT ERRED IN INTERPRETING UNITED STATES V. RELIABLE TRANSFER, INC., 421 U.S. 397 (1975) AS ENTITLING IT TO DISREGARD THE PRINCIPLES ENUNCIATED IN OTHER SUPREME COURT CASES UNDER WHICH THE WILMINGTON GETTY SHOULD HAVE BEEN EXONERATED.

Despite Sun/TTT's protestations (Brief, 12-13), it is clear that the District Court, in deciding to hold the WILMINGTON GETTY contributorily liable, attached great importance to its belief that the courts "must take a fresh look at what constitutes negligence so that the true purpose of Reliable may be achieved" (JA 121). We submit that the "true purpose" of Reliable was to permit courts to apportion liability according to degree of fault after deciding that both ships were in contributory fault (Main Brief, 46-51), with each ship still required to prove its charges of negligence against the other by a fair preponderance of the evidence. The Lepanto, 21 F. 651, 655 (S.D.N.Y. 1884).

Nothing whatever suggests that there cannot still be a sole fault case, if a proper and careful analysis of the facts and the law requires such a result. However, the danger of the District Court's view of Reliable's consequences is clearly illustrated by Sun/TTT's brief here: by making a selective statement of facts, ignoring vital matters such as (a) the radio communications, (b) the precise locations of the vessels at material times, and (c) the impossibility of making an accurate radar plot, an almost

plausible argument can be created for criticizing an innocent ship.

Sun/TTT's arguments, criticizing the WILMINGTON GETTY in the situation thrust upon her by the PONCE DE LEON's gross negligence, invite attention to the sage comment of the court in The Ponce, 116 F. 55, 56-57 (E.D.N.Y. 1902):

> "* * * But the offending vessel always accuses. What was done by the unoffending vessel in the high peril which the offending vessel's wrongdoing had brought shows the reverse of beneficial action. If the injured vessel moved, then she should not; if she remained at rest, she should not; if she went forward, she should have gone astern; if she reversed, it was the height of unskillfulness; and so the delinquent seeks to escape, in whole or in part, from the results of his own wrongdoing. Such contention, although not always unavailing, is seldom absent, and in the present instance it should not be upheld."

On that sensible reasoning courts have been and should continue to be wary of inventive but unsound arguments on behalf of ships such as the PONCE DE LEON, whose multiple acts of gross negligence fully account for the collision. See The City of New York, 147 U.S. 72, 85 (1893). The District Court's mistaken view that Reliable vitiated those principles helped lead it into error. On a careful analysis of the facts and the law, the apparent plausibility of Sun/TTT's arguments disintegrates.

SEVENTH POINT

ANSWERING SUN/TTT's POINT III: DETERMINATIONS OF PERCENTAGES OF FAULT ARE CONCLUSIONS OF LAW. EVEN IF SUCH DETERMINATIONS ARE FINDINGS OF FACT, THE FINDING THAT THE WILMINGTON GETTY WAS 20% AT FAULT IN THESE CIRCUMSTANCES WAS CLEARLY ERRONEOUS.

In this Circuit, issues of negligence or contributory negligence, or lack thereof, have long been considered conclusions of law, as distinguished from the evidentiary facts on which such conclusions are based. Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774 (2 Cir. 1966), and the many cases cited therein. Sun/TTT has cited no authority to the contrary, certainly none applicable in this Circuit. Its citations to cases concerning monetary damages (Brief, 34) are not applicable.

This Court has not yet, to our knowledge, decided any post-Reliable collision cases involving percentages of fault. We submit that determinations of such percentages are conclusions of law. The District Court evidently agrees (JA 126).

Also, Sun/TTT's suggestions (Brief, 35) that the English courts'"basis for reversal or modification of a trial court's finding probably differ(s) considerably" from our courts is mistaken. The English standards are very similar to ours. In The "Toni", [1974] 1 Lloyd's Law Rep. 489, both ships appealed from the trial court's determination of equal fault. The Court of Appeal stated the basis for review as follows, p. 491:

> "Both parties face a formidable task, it being established that this Court will not interfere with the decision of the lower Court in the matter of apportionment unless it emerges clearly that it was based on some mistake of fact or mistake of law ..."

Thus, the English decisions are highly relevant authorities.

This Court should reject totally Sun/TTT's argument (Brief, 34) that it should not set a precedent for modifying percentages of fault determined by a trial judge. Adjudication of the degree of liability may be no less important than adjudication of whether liability exists - indeed, depending on results, it may be more important - and there is no reason or authority for leaving this entirely to the discretion of the District Court - particularly when as in this case, that Court has erroneously failed to find certain contributory faults on the part of one vessel (the PONCE DE LEON) and, at a minimum, has erroneously attributed certain faults to the other (the WILMINGTON GETTY). Sun/TTT has advanced a mistaken argument in favor of rationing justice, soundly condemned by this Court. Kaufman, The Second Circuit: Reputation for Excellence, 63 A.B.A.J. 200, 203 (February 1977).

In any event, given the gross negligence of the PONCE DE LEON, undisputed on this appeal, the PONCE DE LEON's contributory faults were far more than only four times as great as the WILMINGTON GETTY's; if the latter was in contributory fault at all, the proportions should, in justice, be modified to close

to 95%-5%, regardless of whether this Court concludes there were additional faults on the PONCE DE LEON's part as Getty has contended, supra, pp. 11-12. The reckless speed of the PONCE DE LEON in particular afforded no reasonable opportunity to evaluate the situation and was the preponderant cause of the extensive damage to both ships.

CONCLUSION

The judgment of the District Court should be reversed and the PONCE DE LEON and Sun/TTT adjudged solely liable for the collision and resulting damages. Alternatively, if there were any causative faults on the WILMINGTON GETTY's part (which is denied), the proportion of liability assessed against the WILMINGTON GETTY should be modified so as not to exceed five per cent. The cross-appeal should be dismissed.

Dated: March 8, 1977

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that two copies of the within Reply Brief was this day served by mail on the following:

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